What are your rights as a musician if you have two bosses?

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Who's your employer: your bandleader – or the venue? Maybe both! The answer makes a difference...

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AS A MUSICIAN, who is your employer? This is not as simple as you may think. Many times, freelance musicians are hired by a bandleader, who in turn is contracted by a producer, who in turn is paid by some kind of corporate sponsor. Who then is the employer: the bandleader, the producer, or the corporation?

Well – it is possible to have more than one employer! Consider this: Local 802's hotel contract says that when musicians perform at a hotel, they are employees of both the hotel *and* the club date agency who directly hired the musician.

A joint employer is just what it sounds like. Rather than one entity, there are two or more who are responsible for payment of wages, benefits, unemployment, workers' comp, taxes and any other obligations to workers.

Furthermore, joint employers can both be deemed jointly responsible if either party violates the law or commits an unfair labor practice.

But why do unions care about joint employers anyway? If we can prove that workers have two employers, then both employers can be held liable for labor infractions. This increases our leverage. This is particularly true when a franchise or subcontractor is involved. In these circumstances, a larger parent organization often pawns off management responsibility to a less solvent or stable organization, while they at the same time reap the benefits and profits. This has particular relevance to the fast food industry, where this practice is most prevalent. In these circumstances it is extremely difficult to demonstrate that the parent organization shares control. In fact, the parent intentionally shelters itself from these responsibilities to avoid liability. (Easy example: let's say workers at a particular McDonald's restaurant want to unionize. Who holds the real power: the local franchise owner or the national McDonald's corporation?)

For many years, it was difficult to prove joint employership. Then in 2015, the NLRB rendered a case called Browning-Ferris Industries, which liberalized the standard for proving joint employers. Things were better for workers for a few years – until the NLRB changed course again in 2017 with a decision called Hy-Brand Industries Contractors. The Hy-Brand decision was considered a major victory for corporate America since it restored the earlier joint employer standard, which required the demonstration that two or more employers needed to have *direct contro*l over each other's operations for them to be considered joint employers. (The liberalized standard had made it easier for employees to organize franchises and satellite operations where only an indirect financial relationship existed between the employers.)

Now, in a stunning turn of events, Hy-Brand has been vacated due to a conflict of interest that I wrote about in these pages last month.

On Feb. 26, the NLRB voided the Hy-Brand decision based on a determination by the board's designated agency ethics official. The board found that NLRB member William Emanuel should have been disqualified from participating in the proceeding because his law firm had represented a corporation involved in the original litigation that had resulted in the new standard. Emanuel's involvement in Hy-Brand appeared to be a "do-over" of the prior litigation.

The NLRB's decision to vacate Hy-Brand was prompted by a report issued by David P. Berry of the NLRB's office of Inspector General a few weeks prior. The report held that Emanuel had violated Presidential Executive Order 13770 that prohibited an appointee to the board from participating in a matter that the employee's former employer is either a party or had represented a party in. According to Berry's analysis, "the wholesale incorporation of the dissent in Browning-Ferris into the Hy-Brand majority decision consolidated the two cases into the same particular matter involving specific parties," thus triggering EO 13770. Hy-Brand was deemed to be a continuation of the Browning-Ferris deliberative process, which should have resulted in Emanuel's recusal from the case. This report suggests that Emanuel's inclusion in the deliberations may have been an intentional ethics breach rather than an unintended one, as it is titled "notification of a serious and flagrant problem and/or deficiency with the NLRB's deliberative process."

Nonetheless, in a subsequent report on this subject issued by Berry on March 20, he concluded that while Emanuel had not intentionally provided false information to a Congressional oversight committee investigating the ethics breach, he should have been aware that his involvement in the decision prompted a breach. This was obvious since Emanuel had admitted that he was aware that his prior law firm, Littler Mendelson was a representative of a party in the Browning-Ferris litigation. Such knowledge triggered Emanuel's obligation to seek ethics guidance from Berry's office. Why he failed to do so is not addressed in the report.

As a result of the NLRB's decision to vacate Hy-Brand, the board's new liberal joint-employer standard remains intact – at least for now. How long it will survive in this highly partisan environment is anyone's guess. However, let's enjoy this victory while we can. It certainly demonstrates that our system of checks and balances is still somewhat intact.

Some of the information in this column was reprinted from previous columns I've written. If you think you're working as a musician with two (or more) different employers and you want to know your rights, contact the Local 802 Organizing Department at (212) 245-4802.